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No. 88-1714

In The

Supreme Court of the United States

October Term, 1988

KAREN MILLER,

Petitioner,

v.

PUBLISHERS PAPER COMPANY, a Delaware corporation, et al,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PUBLISHERS PAPER COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Section 301 of the Labor Management Relations Act preempts state law claims which require for their resolution analysis of the terms of a labor contract.

The question presented is whether an employee's state law claim for wrongful discharge is preempted by Section 301, where (i) the employee asserts that she was discharged in retaliation for insisting upon benefits conferred by a collective bargaining agreement and (ii) the employer's asserted right to terminate the employee's employment under specific circumstances related to a disability is also spelled out in the collective bargaining agreement.

2. Section 301 of the Labor Management Relations Act requires labor unions to represent their members fairly; it forbids representation which is arbitrary, discriminatory or in bad faith.

The question presented is whether a labor union fulfills its Section 301 duty when it performs a concededly complete factual investigation of a member employee's grievance against an employer, but does not (i) inform the employee of the employer's decision to terminate her employment immediately upon learning of that decision; (ii) thereafter urge the employer to modify its purportedly erroneous legal analysis; and (iii) notify the employee in advance that the union leadership's recommendation that the grievance be withdrawn will be voted upon at a regularly scheduled meeting of the union membership.

Rule 28.1 Listing

Smurfit Newsprint Corporation is a successor corporation of Publishers Paper Co. Jefferson Smurfit Corporation owns 80 percent of the stock of Smurfit Newsprint Corporation. Times Mirror Company owns 20 percent of the stock of Smurfit Newsprint Corporation.

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Though the petition refers to Chapter 659 of the Oregon Revised Statutes (Pet 5), plaintiff does not challenge the circuit court's disposition of her state statutory claim of discrimination based upon physical handicap. Plaintiff's other claims against Publishers Paper Company – one for common law wrongful discharge under

state law and another for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act – plainly do not merit review.

STATEMENT OF THE CASE

Plaintiff's claim against Publishers for breach of the collective bargaining agreement requires proof that the unions breached their Section 301 duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 US 554, 571 (1976). Plaintiff's statement of facts omits evidence which bears on that aspect of her claim.

First, local union representatives were not told until August 21 – the same day that plaintiff and her doctors testified – that plaintiff's employment with Publishers would be terminated pursuant to Section 20D(2)(c) of the collective bargaining agreement if the physicians testified, as expected, that she was permanently disabled as a result of the automobile accident.

Not long after the jury gave her $55,000 and Publishers gave her notice that her employment was terminated, plaintiff filed her grievance. Union officials and Publishers management met twice – once in September 1984 and again in October – but Publishers refused to reinstate plaintiff. By December 1984, after reviewing a transcript of the testimony in plaintiff's personal injury trial, union leadership were convinced beyond doubt that plaintiff could not prevail in an arbitration against Publishers. A union representative reviewed the transcript with plaintiff and explained its significance to her, but

apparently did not inform her in advance that the leadership would recommend to the union membership that they vote to withdraw the grievance.

Despite plaintiff's willingness to return to work, Publishers had eliminated her job and several others during her absence, and she knew of no job she was capable of performing. Nonetheless, plaintiff filed this action after learning in May 1985 that her grievance had been withdrawn.

REASONS WHY THE PETITION SHOULD BE DENIED

I

PLAINTIFF'S CLAIM FOR COMMON LAW DISCHARGE UNDER STATE LAW

A

The circuit court's decision is not in conflict with this Court's decisions on the preemptive sweep of Section 301 of the Labor Management Relations Act.

The application of state law is preempted if the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, *Lingle v. Norge Division, Magic Chef*, 486 US ___, ___ (1988), if "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. * * *" *Allis-Chalmers Corp. v. Lueck*, 471 US 202, 213 (1985). Stated differently,

> "* * * state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. * * *" *Allis-Chalmers Corp. v. Lueck, supra*, 471 US at 213.

The circuit court's decision is faithful to those principles.

Here, plaintiff's right to disability benefits was conferred by the collective bargaining agreement; plaintiff concedes that it did not exist independently of the private contract. Here, Publishers' right to terminate plaintiff's employment upon competent medical advice that she should not resume work was also spelled out in the collective bargaining agreement; it was not a matter of state law. As the circuit court put it, "regardless of how [plaintiff's] state wrongful discharge claim is characterized, it is preempted by section 301 because it is 'inextricably intertwined' with consideration of the terms of the collective bargaining agreement." Memorandum, October 20, 1988, at 3-4. Based upon *Lingle* and *Allis-Chalmers*, that is the only conclusion supported by this record, and there is nothing to plaintiff's bald assertion of conflict between the circuit court's decision and the decisions of this Court.

B

The circuit court's decision is correct on grounds not raised in the petition.

Though the circuit court decided plaintiff's wrongful discharge claim on Section 301 preemption grounds, the court's decision is correct on at least two other grounds not raised in the petition.

First, the nature of a state tort is a matter of state law, *Allis-Chalmers Corp. v. Lueck, supra*, 471 US at 213-214, and plaintiff's complaint does not state a claim for wrongful discharge. In Oregon, the tort wrongful discharge

evolved as a limited exception to the rule that an at-will employee may be discharged at any time, for any reason. *See, e.g., Simpson v. Western Graphics*, 293 Or 96, 99, 643 P2d 1276 (1982). The tort protects only (i) those who have been discharged for performing important societal obligations such as jury duty, *Nees v. Hocks*, 272 Or 210, 536 P2d 512 (1975), or refusing to defame another, *Delaney v. Taco Time Int'l.*, 297 Or 10, 681 P2d 114 (1984); and (ii) those who have been discharged for exercising statutory rights, not private contractual rights, related to their role as an employee. *See, e.g., Holien v. Sears, Roebuck & Co.*, 298 Or 76, 689 P2d 1292 (1984); *Brown v. Transcon Lines*, 284 Or 597, 588 P2d 1087 (1978). The Oregon Court of Appeals has declined to extend the tort to cover those subject to a collective bargaining agreement. *Embry v. Pac. Stationery and Printing Co.*, 62 Or App 113, 659 P2d 436 (1983).

This plaintiff was subject to a collective bargaining agreement, and the record permits no inference that she was discharged for performing a societal obligation, important or otherwise, or for exercising a statutory right at all, let alone one related to her employment. Because that is so, the circuit court decided plaintiff's wrongful discharge claim correctly, and this Court need never reach the first question raised in the petition (Pet i).

Plaintiff's wrongful discharge claim is also foreclosed by so-called Garmon preemption, which is another reason this Court need not address the first question raised in the petition. Garmon preemption holds that when an activity is arguably subject to Section 7 or 8 of the National Labor Relations Act, "the States as well as the federal courts must defer to the exclusive competence of

the National Labor Relations Board * * *." *San Diego Building Trades Council v. Garmon*, 359 US 236, 245 (1959).[1] When plaintiff requested and obtained disability benefits under the collective bargaining agreement, she engaged in "concerted activity" protected by Section 7 of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 US 822, 831-832 (1984). Had Publishers terminated plaintiff's employment for that activity, as plaintiff alleges, that termination would have been in violation of Section 8 of the Act.

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[1] Section 7 of the Act provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 29 USC § 157.

Section 8 of the Act provides in pertinent part:

> "(a) It shall be an unfair labor practice for an employer –
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." 29 USC § 158.

Because that is so, plaintiff's claim for wrongful discharge is preempted. *San Diego Building Trades Council v. Garmon, supra,* 359 US at 245. As a consequence, there is no need to decide the first question raised in the petition.

II

PLAINTIFF'S CLAIM FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

A

The circuit court's decision is not in conflict with this Court's decision in *Vaca v. Sipes*.

A union employee who claims to have been discharged by an employer in violation of a collective bargaining agreement must prove, not only that the employer breached the agreement, but also that the union breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc., supra,* 424 US at 570. *See DelCostello v. Teamsters,* 462 US 151, 164 (1983); *United Parcel Service v. Mitchell,* 451 US 56, 62 (1981). That duty is breached only if a union's representation is "arbitrary, discriminatory, or in bad faith. * * *" *Vaca v. Sipes,* 386 US 171, 190 (1967).

The circuit court held that the unions did not breach their duty of fair representation in this case. Memorandum, October 20, 1988, at 6-7. The petition asserts (Pet 29), with not a single word of analysis, that the circuit court's decision "is in conflict with this Court's pronouncements in *Vaca v. Sipes* * * *." Conflicts, however, do not exist simply because lawyers say they do, and any supposed conflict between the circuit court's decision here and this Court's decision in *Vaca v. Sipes* is indiscernible.

B

The circuit court's decision is not in conflict with decisions in other circuits.

Neither is the circuit court's decision, which is extraordinarily fact-specific, in conflict with the decisions of the Courts of Appeal for the Fourth and District of Columbia Circuits.[2]

The collective bargaining agreement permitted Publishers to terminate plaintiff's benefits under the agreement if "competent medical authority advises that such employee is deemed permanently disabled to the point where employment should not be resumed." The circuit court rejected as untenable plaintiff's assertion that the unions breached their duty of fair representation by failing to inform plaintiff that Publishers would terminate her benefits if her physicians testified in the personal injury trial that she was totally disabled. Memorandum, October 20, 1988, at 7. The court reasoned that, because "* * * there is no evidence that [plaintiff's] doctors testified untruthfully at the trial, we must assume that prior knowledge of Publishers' intentions by [plaintiff] would not have affected her termination." *Id.* That holding is not in conflict with *Warehouse Union, Local 860 v. National Labor Relations Board*, 652 F2d 1022 (DC Cir 1981).

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[2] The petition's second question (Pet i-ii) ("Whether Plaintiff-Petitioner raised a genuine issue of material fact * * *") underscores the fact-specific nature of the decision, a circumstance which itself should foreclose a grant of certiorari. *United States v. Johnston*, 268 US 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

The court in *Warehouse Union* held that the union acted arbitrarily when, in the course of protracted labor negotiations, it did not inform certain of its members of management's repeated threats to eliminate the members' jobs if they insisted upon substantial wage hikes. The unions' arbitrary conduct was detrimental to the bargaining employees because it prevented them from making "an informed reassessment of their wage demand. * * *" 652 F2d at 1025. In the case before the Court today, however, even if the unions had informed plaintiff of Publishers' intentions before her doctors testified, their testimony would have been the same. One does not "reassess" and change one's injuries (at least not prior to the recovery of a substantial verdict on account of them) the way one reassesses and changes wage demands, and plaintiff's speculation (Pet 27-28) that her lawyers may have been able to persuade the doctors to shade their testimony or that they could have settled the case, had they known of Publishers' intentions, is still only speculation – and not very good speculation, at that; it has no record support.

This case is also quite different from and not inconsistent with *Carpenter v. West Virginia Flat Glass, Inc.*, 763 F2d 622 (4th Cir 1985), where the union acted arbitrarily in failing to ask an examining physician his opinion whether the discharged employee was physically able to work. That opinion, had it been expressed, would have resulted in the employee's return to work. Here, the circuit court held that the unions acted within the bounds of permissible discretion, not discriminatorily or in bad faith, when they did not urge Publishers to consider whether plaintiff could perform a job other than her old

one, which had been eliminated. Memorandum, October 20, 1988, at 5, 7. Though the circuit court did not say so in its decision, there was no evidence of any job plaintiff was capable of performing – she said she could not even tip her head to drink a soda – and the unions' failure to object to Publishers' allegedly improper job comparison, unlike the union's failure to ask the doctor's opinion in *Carpenter*, was therefore not the least bit crucial to plaintiff's grievance. The two decisions are not at all inconsistent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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